



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

NOV 20 2008

Amy D. Cubbage, Esq.
Frost Brown Todd, LLC
400 West Market Street, 32nd Floor
Louisville, KY 40202-3363

Re: MUR 5965
Gregory E. Fischer; Fischer for U.S. Senate
and Ruth Payne, in her official capacity as
treasurer

Dear Ms. Cubbage:

On January 28, 2008, the Federal Election Commission ("Commission") notified your clients, Gregory E. Fischer, Fischer for U.S. Senate and Ruth Payne, in her official capacity as treasurer (collectively, "Respondents") of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. On November 6, 2008, the Commission found, on the basis of the information in the complaint and information provided by Respondents, that there was no reason to believe they violated 2 U.S.C. § 441b(a). On the same date, the Commission dismissed the allegation that Fischer for U.S. Senate and Ruth Payne, in her official capacity as treasurer, violated 2 U.S.C. § 434(b) by failing to report in-kind contributions from Iceberg Ventures, LLC. Accordingly, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003). The Factual and Legal Analysis, which explains the Commission's findings, is enclosed for your information.

If you have any questions, please contact Ruth Heilizer, the attorney assigned to this matter at (202) 694-1598.

Sincerely,

A handwritten signature in cursive script, reading "Susan L. Lebeaux".

Susan L. Lebeaux
Acting Deputy Associate General Counsel
for Enforcement

Enclosure: Factual and Legal Analysis for Gregory E. Fischer;
Fischer for U.S. Senate and Ruth Payne, in her official capacity as treasurer

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1 **FEDERAL ELECTION COMMISSION**

2 **FACTUAL AND LEGAL ANALYSIS**

3 **RESPONDENTS:** Gregory E. Fischer
4 Fischer for U.S. Senate and Ruth Payne,
5 in her official capacity as treasurer
6

MUR: 5965

7 **I. INTRODUCTION**
8

9 This matter was generated by a complaint filed with the Federal Election Commission
10 (“Commission”) by Jack L. Richardson, IV. *See* 2 U.S.C. § 437g(a)(1).

11 Gregory E. Fischer, the Chief Executive Officer of Dant Clayton Corporation (“Dant
12 Clayton”), declared his intention to run in Kentucky’s 2008 Democratic primary for a United
13 States Senate seat on his campaign website on January 16, 2008. The complaint alleges that
14 Fischer and Fischer for U.S. Senate and Ruth Payne, in her official capacity as treasurer (“the
15 Committee”), accepted impermissible corporate in-kind contributions during December 2007 in
16 the form of corporate resources utilized in connection with Fischer’s Senate race, specifically the
17 use by Fischer of his corporate e-mail account to seek finance staff should he decide to run, and
18 the inclusion in an attachment to his e-mail of the corporate e-mail address of a Dant Clayton
19 employee for receipt of resumes from persons interested in applying. The complaint also states
20 that Fischer’s limited liability company, Iceberg Ventures, LLC (“Iceberg Ventures”), had
21 previously paid for and registered several website domain names used in connection with his
22 Senate candidacy, which might require Fischer’s campaign to report in-kind contributions from
23 Iceberg Ventures.

24 In their joint response to the complaint, Fischer and the Committee do not deny the
25 alleged e-mail activities, but maintain that they did not constitute in-kind corporate contributions.
26 Fischer and the Committee did not address the registration of domain names by Iceberg
27 Ventures.

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1 **II. FACTS**

2 The complaint is based on two blog website reports, which are attached thereto; one of
3 the reports contains a copy of an e-mail and job description that Fischer sent from his Dant
4 Clayton corporate e-mail account on December 24, 2007, addressed to “undisclosed recipients.”
5 In the e-mail, Fischer states “[w]hile I have not made a final decision re the US Senate run, we
6 are preparing for a possible announcement in January.” Fischer further states that since
7 “[f]undraising is one of the first activities to kick into gear,” paid finance staff and a Finance
8 Director are needed. He asks the e-mail recipients to think about persons who might qualify and
9 attaches to his e-mail a job description for the positions.¹ The attachment concludes: “To apply,
10 e-mail cover letter and resume to: csadler@dantclayton.com.” It appears that Cindy Sadler, a
11 Dant Clayton employee, is the “csadler” referenced in the e-mail attachment. *See*
12 <http://center.spoke.com/info/p9IbWzr/CindySadler>.

13 The complaint also states, based on an attached blog website report, that Fischer’s limited
14 liability company, Iceberg Ventures, is the owner of several internet domain names connected
15 with his Senate candidacy. The blog website report states, “[u]tilizing his LLC to do work for
16 his campaign is fine, as long as it is reported to the FEC s an in-kind contribution that does not
17 exceed \$1,000.” Available at www.pageonekentucky.com. We have been able to confirm that
18 Iceberg Ventures, which is not incorporated, registered the domain name www.gregfischer.com,
19 used by Fischer’s campaign, with www.godaddy.com. According to godaddy’s website, its
20 registration fee for .com domain names recently has been discounted from \$9.99 to \$6.85 per

¹ The attached job description is headed “DEMOCRATIC CAMPAIGN STAFF NEEDED,”
subheaded “HIRING FINANCE STAFF IN CAMPAIGN TO BRING FRESH IDEAS TO THE US
SENATE,” and states that the responsibilities include “[t]raveling and working directly with the Candidate
and Friends of the Candidate.”

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year. See http://www.godaddy.com/gdshop/compare/gdcompare_domain.asp?isc=gext1003b
(May 19, 2008).

III. ANALYSIS

A. Corporate Contributions

The Fischer/Committee joint response asserts that because Fischer was not yet a “candidate” within the meaning of 2 U.S.C. § 431(2) when the activity took place, the ban on corporate contributions was not applicable.² It further maintains that even if Fischer was a “candidate” at the relevant time, “the exception [in 11 C.F.R. § 114.9(a)] for the ‘occasional, isolated, or incidental’ use of corporate resources by volunteers would apply to a volunteer’s receipt of resumes and other work performed by Dant Clayton employees voluntarily and on their own time.” Fischer/Committee Response at 2.

The Act prohibits corporations from making contributions or expenditures from their general treasury funds in connection with any election of any candidate for Federal office. Contributions include “any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office.” 2 U.S.C. § 431(8)(A)(i). The Act defines expenditures as “any purchase, payment distribution, loan, advance, deposit, or gift of money or anything of value made by any person for the purpose of influencing any election for Federal office.” 2 U.S.C. § 431(9)(A)(i). The term “anything of value” includes all “in-kind contributions.” 11 C.F.R. § 100.7(a)(1)(iii)(A). See 2 U.S.C.

² Whether Fischer was a candidate or not at the time of the activities in question, he was not permitted to accept corporate contributions even though he had not yet become a “candidate.” Sections 101.2 and 101.3 of the Commission’s regulations provide that when an individual becomes a candidate, all funds received or payments made in connection with his or her campaign prior to becoming a candidate are considered contributions or expenditures under the Act and must be disclosed in the first report filed by the candidate’s authorized committee. Because funds or payments made in connection with a pre-candidacy campaign may later be subject to federal restrictions and reporting requirements, they must be federally compliant. See also 11 C.F.R. §§ 100.72(a) and 100.31.

§ 441b(b)(2).

While a campaign's use of corporate resources may be deemed to be an in-kind contribution and, thus, an illegal corporate contribution in violation of 2 U.S.C. § 441b, section 114.9(a)(2) of the Commission's regulations contains a safe harbor that describes certain uses of corporate facilities to be "occasional, isolated, or incidental," and, if qualifying as such, not prohibited corporate contributions. Individual volunteer activity that does not exceed one hour per week or four hours per month, regardless of whether the activity is undertaken during or after normal working hours, as well as voluntary individual Internet activities, as set forth in 11 C.F.R. § 100.94, fall within the safe harbor, provided that the activity does not prevent an individual from completing the normal amount of his or her compensated work, does not increase the overhead or operating costs of the corporation, and is not performed under coercion. *See* 11 C.F.R. § 114.9(a)(2)(ii). *See also Explanation and Justification for Internet Communications*, 71 Fed. Reg. 18589, 18611 (April 12, 2006) ("E&J").

Section 100.94, referenced in this safe harbor provision, exempts individual volunteer Internet activity, whether independent or in coordination with a candidate, from the definition of "contribution." The exemption applies to an individual's uncompensated personal services related to Internet activities, which includes sending or forwarding messages, providing a hyperlink or other direct access to another person's website, paying a nominal fee for the use of another person's website, and any other form of communication distributed over the Internet. The exemption also covers an individual's uncompensated use of equipment or services, including computers, software,

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1 domain names, and any other technology that is used to provide access to or use of the
2 Internet, regardless of who owns the equipment and services.

3 Based on the available information, it appears that the activities in issue fall within the
4 scope of the safe harbor provision. The complaint offers no indication that Fischer did anything
5 but use his company's e-mail account on behalf of his campaign (and he did so at 12:52 A.M. on
6 December 24, 2007, which means that he likely wrote and sent it on his own time, not Dant
7 Clayton's), and ask individuals interested in joining the campaign to send resumes to another
8 Dant Clayton employee's e-mail address. These activities are encompassed in section
9 114.9(a)(2)'s safe harbor provision. *See* E&J at 18596 ("there is virtually no cost associated with
10 sending e-mail communications, even thousands of e-mails to thousands of recipients...."). Nor
11 does the complaint provide any indication that Dant Clayton employees, including Ms. Sadler,
12 engaged in activities on behalf of Fischer's campaign that were outside of section 114.9(a)(2)'s
13 safe harbor provision. Thus, the use of Dant Clayton's corporate resources does not constitute an
14 in-kind corporate contribution.

15 Therefore, the Commission finds no reason to believe that Gregory E. Fischer and
16 Fischer for U.S. Senate and Ruth Payne, in her official capacity as treasurer, violated 2 U.S.C.
17 § 441b(a).

18 **B. In-kind contribution from Iceberg Ventures**

19 The complaint also alleges that the Committee may have been required to report the
20 costs incurred by Fischer's limited liability company, Iceberg Ventures, for registering
21 eight domain names in anticipation of a possible Senate run, one of which was used as the
22 official campaign website. Fischer and the Committee did not respond to this allegation.

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1 Authorized committees are required to report and identify each person who makes
2 a contribution or expenditure with an aggregate value in excess of \$200 within an election
3 cycle, as well as to report unitemized contributions and operating expenditures. 2 U.S.C.
4 § 434(b), 11 C.F.R. § 104.3. In-kind contributions are reported as both receipts and
5 expenditures. 11 C.F.R. § 104.13. However, because the current annual cost of registering
6 the domain names is under \$10.00, even if the campaign utilized all eight domain names
7 allegedly registered to Iceberg Ventures, it appears likely that the aggregate cost for the
8 eight registered domain names would be below the \$200 level for itemized in-kind
9 contributions or expenditures, and therefore, too low to justify using the Commission's
10 limited resources to investigate whether they were included in the unitemized receipts and
11 operating expenditures on the Committee's detailed summary page, or to otherwise pursue
12 the matter.

13 Therefore, the Commission dismisses the portion of the complaint alleging that
14 Fischer for U.S. Senate and Ruth Payne, in her official capacity as treasurer, may have
15 violated 2 U.S.C. § 434(b) by failing to report in-kind contributions from Iceberg Ventures,
16 LLC. *See Heckler v. Chaney*, 470 U.S. 821 (1985).

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